

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-2023

United States Court of Appeals
For The Second Circuit

Docket No. 77-2023

UNITED STATES OF AMERICA, ex rel.
VICTOR MAYO,

Petitioner-Appellant

-against-

RAY BOMBARD, Superintendent of Greenhaven
Correctional Facility at Stormville, New York,

Respondent-Appellee

On Appeal From The United States District Court
For The Southern District of New York

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

JAMES B. KOBAK, JR.
Attorney for Petitioner-Appellant
One Wall Street
New York, New York 10005
(212) 943-6500

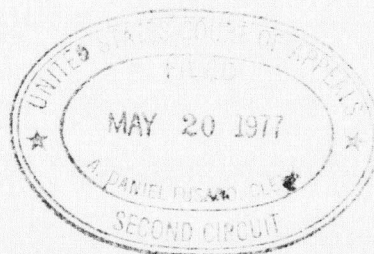


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PETITION FOR REHEARING AND
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Preliminary Statement

Petitioner-Appellant Victor Mayo petitions for rehearing pursuant to Fed. R. App. P. 40 and suggests rehearing in banc pursuant to Fed. R. App. P. 35, of that portion of the decision of this Court (Oakes and Van Graafeiland, C.J.J. and Neaher, D.J.) which holds that, "while the question of effective assistance of counsel is a close one," it must be decided (and habeas corpus relief denied) on the

basis of the "farce and mockery of justice" standard which this Court continues to apply although it has been rejected in other Circuits and in many state courts.

FACTS RELEVANT TO THE PETITION

The petition arises from Mayo's conviction for the robbery of seventeen dollars from a candy store and related crimes in 1960. At the time Mayo was seventeen years old. Prior to the robbery Mayo had spent all but a few months of his life in foster homes or mental institutions; had been certified as "mentally ill"; had resorted to eating glass and banging his head against the wall "every time [he] got mad and wanted to die" (A. 134); and had been diagnosed as a schizophrenic and uncommunicative personality with possible brain damage and a marginal intelligence in records maintained by State mental hospitals and other public institutions.

The facts that Mayo had a "history of mental illness" and had been committed to a State mental hospital for five and a half years were easily discoverable and were known to Mayo's assigned attorney by the time Mayo was sentenced, yet counsel made no effort to inquire into Mayo's competency to stand trial,¹ his sanity or the volun-

1. Counsel could have requested a competency determination at any time prior to the imposition of sentence under former Section 658 of the New York Code of Criminal Procedure, L.1939, ch. 861, § 2.

tariness of a confession elicited at police headquarters at four o'clock in the morning after an evening of drinking and six and a half hours in police custody. Mayo's counsel, then a lawyer for only a matter of months (A. 116-17), admits that he "had not sufficient experience" (A. 127) either to ask routine background questions before trial or to investigate Mayo's history of mental illness after it was disclosed at sentencing. He also admits that the "proper thing" (A. 127), even in a case involving a candy store robbery, would have been to make such rudimentary investigations.

On at least two occasions during trial the court pointedly asked counsel whether certain steps (such as stipulating to Mayo's statement to the police) had been taken after consultation with the client. (A. 59-60, 74.) On one of these occasions the court asked Mayo if he knew who his counsel was. (A. 74.) Before trial, conversations between Mayo and his attorney had been, as counsel put it, "at a minimum." (A. 117.) After trial, counsel failed to advise Mayo of his right to appeal.

Mayo is still in the custody of the State but for a 1966 conviction based on a plea of guilty to a manslaughter indictment. Because of the 1960 robbery conviction, Mayo was sentenced for his 1966 crime under a "reci-

divist statute". Had Mayo not been illegally convicted in 1960, the maximum sentence under the applicable sentencing statute² would be five years less than the maximum term he received under the recidivist statute in 1966.

Mayo was paroled between the time his petition was filed and the time the District Court (Canella, J.) handed down its decision. Unless the conviction is vacated, the period of Mayo's parole will be longer than it could have been had Mayo not been unconstitutionally convicted in 1960.

REASONS FOR GRANTING REHEARING

THE COURT SHOULD ABANDON THE
"FARCE AND MOCKERY OF JUSTICE"
STANDARD IN CASES WHERE COUNSEL
HAS FAILED TO INVESTIGATE
MATTERS MATERIAL TO THE DEFENSE

The right to the effective "assistance of counsel" in the preparation of a defense is a fundamental right guaranteed to an accused by the Sixth Amendment and made applicable in State proceedings by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). The fact that Mayo's offenses were relatively petty and the case itself seemingly routine

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2. Former Section 2189 of the New York Penal Law L. 1936, ch 70, § 1, amending Penal Law 1909, § 2189, now Penal Law § 70.00(1) & (3)(McKinney 1975).

did not relieve assigned counsel of his minimal professional obligations to explore his client's background and the circumstances of his arrest:

"[E]ven in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value." Reynolds v. Cochran, 365 U.S. 525, 532-33 (1961).

See also Argersinger v. Hamlin, 407 U.S. 25 (1972).

The panel held that it was bound to decide the effectiveness of counsel issue under the "farce and mockery of justice" standard historically applied in this Circuit. Even under this standard -- probably the most stringent in the country -- the court stated that "the question of effective assistance of counsel is a close one" because of counsel's failure to make rudimentary background investigations; presumably the denial of the petition would have been reversed under any other standard. Judge Oakes noted his view stated in Rickenbacker v. Warden, 550 F.2d 62, 67-68 (2d Cir. 1976) (dissenting opinion), that the Circuit should abandon this standard in favor of one of reasonable competency adopted in other circuits. Judge Oakes also noted that "absent an en banc vote the earlier standard is controlling."

In the Rickenbacker opinion, the question of what standard to apply was considered by the majority (Smith and Meskill, JJ.), as well as by Judge Oakes in dissent.

Judge Smith reviewed the standards applied in other circuits and by the Supreme Court in the context of guilty pleas (id. at 65-66) and observed, "It may be that this court should reconsider the standard set forth in Wight" [United States v. Wight, 176 F.2d 376, 378 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)]. Rickenbacker v. Warden, supra, 550 F.2d at 66. The majority in Rickenbacker concluded that it need not confront the question of appropriate standards because "the performance of Rickenbacker's counsel does not fail to meet any of the suggested standards * * *." Id. at 66. In this case, of course, where the question of effectiveness of counsel is a "close one," the appropriate standard will be dispositive, and thus it is an appropriate case to reconsider the standard.

As noted by the majority in Rickenbacker, the "farce and mockery" standard originated in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). As Judge Oakes noted in dissent, the practical rationale for this test -- lack of written transcripts -- is no longer compelling. Rickenbacker v. Warden, supra, 550 F.2d at 67. Moreover, the effective assistance of counsel question in cases such as Diggs v. Welch was decided as one aspect of procedural due process rather than by direct application of the Sixth Amendment right to counsel. In

post-Gideon cases involving incompetency of counsel at the guilty plea stage, the Supreme Court has defined the standard of effective assistance as one "'within the range of competence demanded of attorneys in criminal cases,'" McMann v. Richardson, 397 U.S. 759, 771 (1970), quoted in Tollett v. Henderson, 411 U.S. 258, 266 (1973), or one "based on the practices of reasonably competent attorneys experienced in the day-to-day business of representing criminal defendants in a trial court." Henderson v. Morgan, 426 U.S. 637, 656 (1976) (Rehnquist, J., with whom Chief Justice Burger joined, dissenting).

The District of Columbia Circuit, which originated the farce and mockery of justice standard, has now abandoned it and determined that the test is whether the defendant had "reasonably competent assistance of an attorney acting as his diligent conscientious advocate." United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). At least five other circuits ³ have formally abandoned the "farce and mockery" standard in favor of one based on reasonable professional competence. United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976); United States v. Toney,

3. The First Circuit's continued adherence to this standard has also become questionable. See Karger v. United States, 388 F. Supp. 595, 598 (D. Mass. 1975), interpreting Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974), cert. denied, 421 U.S. 1003 (1975).

527 F.2d 716, 720 (6th Cir. 1975); United States ex. rel. Williams v. Twomey, 510 F.2d 634, 640-41 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Johnson v. United States, 506 F.2d 640, 646 (8th Cir.), cert. denied, 420 U.S. 978 (1974); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970 (en banc)). In addition, the Fourth Circuit has set forth the services required for assistance of assigned counsel to be considered effective; this test includes a duty to "elicit matters of defense" from the client and "conduct appropriate investigations." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968). Even the circuits that have followed the "farce and mockery of justice" standard have not applied that standard with unyielding rigor in cases involving a total failure to investigate. See Brubaker v. Dickson, 310 F.2d 30, 38-39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963). See generally Note, The Jailed Pro Se Defendant and the Right to Prepare a Defense, 86 Yale L.J. 292, 296-97 & nn. 19-22 (1976). Chief Judge Kaufman in this Circuit warned against the "pitfalls of rigid adherence to phrases and formulas" in such cases in his dissenting opinion in United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 46-48 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973).

In the DeCoster case, supra, and in United States v. Wright, 489 F.2d 1181, 1188 n.6 (D.C. Cir. 1973), the

District of Columbia Circuit relied on the ABA Defense Standards as a guide to determining whether counsel's representation had been professionally competent. See also McQueen v. Swenson, 498 F.2d 207, 216-17 (8th Cir. 1974); People v. Bennett, 29 N.Y.2d 462, 466-67, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972); Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 31-33 (1973). Here, counsel's failure to make any investigation of Mayo's background even after a history of mental illness and institutionalization was disclosed to him was clearly deficient under those standards. See ABA Standards Relating to the Defense Function § 3.2(a) official comment, § 4.1 & official comment, § 8.1(b) (Tent. Draft 1970, approved 1971).

The level of advocacy in the nation's courts has been decried by many people, including the Chief Justice of United States, Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 Fordham L. Rev. 227 (1973), and the Chief Judge of this Circuit. Kaufman, The Court Needs a Friend in Court, 60 A.B.A.J.175 (1974). See also Bazelon, The Defective Assistance of Counsel, supra, at 6-14. The Sixth Amendment right to counsel and ultimately the entire criminal justice system becomes a "farce and mockery of justice" if the lawyers assigned

to represent indigent criminal defendants fail to adhere to even minimal standards of professional competence in consulting with clients and investigating possible defenses.

Conclusion

In cases such as this, where counsel has failed meaningfully to consult with his client or to investigate matters material to the defense, this Circuit's continued adherence to the "farce and mockery" standard is difficult, if not impossible, to reconcile with the Sixth Amendment and difficult to justify at a time of public outcry over the quality of legal services. For these reasons, rehearing should be granted and the matter should be heard en banc.

Dated: New York, New York
May 20, 1977

Respectfully submitted,

JAMES B. KOBAK, JR.
Attorney for Petitioner-Appellant
Victor Mayo
One Wall Street
New York, New York 10005
(212) 943-6500

Of Counsel:

Harold L. Kaplan